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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. FLOYD ODELL, Defendant and Appellant.	B291223 (Los Angeles County Super. Ct. No. BA436727)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Law Firm of Jonathan D. Evans and Jonathan D. Evans for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie C. Brenan, Supervising Deputy Attorney General, Heather B. Arambarri, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Floyd Odell (defendant) of murdering Charles Wilson (Wilson), attempting to murder Pamela Freeman (Pamela), and other associated firearm-related offenses. Defendant elected to represent himself during pretrial proceedings, but almost a year later, on the day trial was to begin, defendant requested a continuance to substitute retained counsel. The trial court denied defendant's request but allowed him to have previously appointed standby counsel take over his defense—granting only a very short continuance of the trial date to enable standby counsel to further prepare. We consider whether either the court's denial of defendant's request to delay trial to obtain retained counsel, or the denial of standby counsel's request for a longer continuance of the trial date, deprived defendant of his Sixth Amendment rights to counsel of his choice and effective assistance of counsel.

I. BACKGROUND

A. Pretrial Proceedings Regarding Counsel for Defendant

When criminal proceedings began in May 2016, defendant was initially represented by the Los Angeles County Public Defender's Office (PD); the Los Angeles County Alternate Public Defender's Office (APD) was appointed when the PD declared a conflict. About two weeks after the APD was appointed, the trial court heard and denied defendant's *Marsden* motion to relieve counsel.[1] A month later, the trial court denied another *Marsden* motion and defendant submitted a written *Faretta v. California* (1975) 422 U.S. 806 advisement and waiver form invoking his

[1] *People v. Marsden* (1970) 2 Cal.3d 118.

right to represent himself.[2] The trial court granted defendant's self-representation request and relieved the APD as attorney of record in April 2017.

About a week after the court granted defendant self-represented status, the court appointed Jimmie Johnson (Johnson) as standby counsel pursuant to Los Angeles County Superior Court Local Rule 8.43 (Rule 8.43). Rule 8.43 provides, among other things, that all discovery must be made available to standby counsel and standby counsel is expected to take over the trial in the event the defendant's self-represented status is revoked or relinquished. (Rule 8.43, subds. (b)-(d).) The rule also makes clear, however, that "standby counsel does not act as advisory counsel nor provide the defendant with legal advice" unless requested to do so by the court. (Rule 8.43, subd. (b).)

Months later, in November 2017, defendant filed a motion to replace Johnson with a specific attorney from the indigent criminal defense appointment panel that defendant preferred. Johnson represented a request for a specific attorney would not be honored by the indigent criminal defense appointment panel and the trial court denied defendant's motion.

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[2] Defendant initialed the form in various places to acknowledge "dangers and disadvantages in not having a professional attorney represent [him]." He acknowledged "no continuance of the trial will be allowed without a showing of good cause[ ] and . . . such requests made just before trial will most likely be denied." He further indicated his understanding that "depending on the stage of [his] case, if [he] change[s his] mind and request[s] an attorney to handle [his] case, the Court may deny this request and . . . [he] may have to proceed with the trial without an attorney."

The trial court thereafter granted defendant's motion to continue the trial date and to appoint an expert to analyze DNA evidence. When the case was called for trial in February 2018, the court again continued the trial to March but warned no further continuances would be granted. The case was again called for trial on March 26, 2018, and, over defendant's objection, the trial court deemed both parties ready. Trial was set to begin on April 3, 2018.

The parties appeared in court on that date and defendant requested a 60-day continuance of the trial date because he was "not ready." Defendant told the court he had "conferred with an attorney and he [the attorney, Jonathan Evans (Evans)], on short notice, went out of town, and he wasn't supposed to be back until next Thursday. He said he would be sending someone in."[3]

The trial court acknowledged Evans did have another attorney appear on his behalf in another courtroom earlier that morning but noted "the judge in [Department] 100 [the trial assignment court] did not allow substitution."[4] Explaining further, the trial court told defendant that his case was "old," that defendant did not have the retained attorney at the trial

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[3] April 3, 2018, was a Tuesday. The following Thursday, the date Evans was due back in town, was April 12, 2018.

[4] No transcript of the proceedings in Department 100 is included in the appellate record. The pertinent minute order that is included in the record states an attorney appeared on behalf of Evans. According to the minute order, defendant represented Evans had been retained and defendant lodged with the court a motion for a continuance (which also is not included in the appellate record). The judge presiding in Department 100 declined to permit substitution.

readiness conference held the prior week, and that the court was sure the trial assignment judge had considered case law that "allows the court to deny a defendant's continuance on the date of trial to retain private counsel." Defendant protested he had made efforts to retain counsel earlier but with "the numbers that they [were] asking" it "wasn't doable." The trial court then cited additional authority to explain defendant "waited to[o] long" to make his request to have private counsel represent him, and when defendant said he still would like to have his "own attorney," the trial court responded, "That's not going to happen, sir. That's been denied."

Remarking that he "can't do it [him]self," and having had requests for a continuance or "co-counsel" denied, defendant informed the court he wanted to relinquish his self-represented status and have standby counsel appointed to represent him at trial. Standby counsel Johnson was present in court, as he had been for all pretrial appearances, and the court immediately appointed him as defendant's attorney of record. Johnson then asked "for a brief continuance of a few days," explaining he had "never even talked to [defendant]." The court, in its words "out of fairness," agreed to start trial two days later (Thursday) with opening statements to begin no earlier than the following Monday, April 9, 2018.

In the morning on the date trial began, April 5, 2018, Johnson filed a motion to continue the trial for "30 to 45 days." Johnson's declaration in support of the continuance acknowledged he had been standby counsel for "several months" but emphasized he was not able in that capacity to file motions, engage expert witnesses, confer with defendant, and "[d]irect and guide the investigation of the case." He further stated he needed

additional time to search for witnesses identified in police reports, study the DNA and toxicology evidence in the case and "get expert input," study transcripts of statements and interviews, "research issues regarding motions as to admissibility," and "[s]pend time conferring with defendant." Johnson added he was obligated to give defendant competent, effective representation and was not "adequately prepared to do that."

The trial court denied Johnson's continuance motion. The court explained Johnson had been standby counsel since May 2017 (i.e., roughly a year before the start of trial) and emphasized the local court rules contemplate standby counsel will take over when a defendant relinquishes self-represented status close to trial. The court further reasoned: "The problem with standby counsel—and again, this is not your problem—is you take the case as it comes. You have been given, under [Rule 8.43,] subdivision (c), all discovery. The fact that you would have done items differently as a diligent counsel is not grounds to grant the continuance. . . . The problem with standby counsel is one does accept the case as one gets it."

Trial then proceeded with Johnson as counsel for defendant.

B. The Offense Conduct, as Established by the Evidence at Trial

1. The charged attempted murders

Pamela's husband James Freeman (James) testified he and his wife were about to enter their car on May 12, 2015, when he turned to see the flash of a gun. He was shot once in the groin. He did not see who shot him and he did not recognize defendant

at trial. Pamela testified she knew defendant from previous encounters. She saw defendant approach her husband, shoot him once, and fire multiple shots at her as she ran away, with one bullet hitting her hand.

2. The charged murder

Elisha Bables (Bables) testified the murder victim Wilson dated her mother "many years ago" and she (Bables) "maintained a relationship with [him] such that [she] call[ed] him dad." According to Bables, Wilson, defendant, and friends gathered in Wilson's home on May 18, 2015, for "dominoes, cards, [and] drinking." Defendant and Wilson argued sporadically over "[m]iscellaneous, frivolous things." Defendant left, but returned a short time later "banging on the door." Bables and Wilson went outside to talk to him. Bables was walking in front of Wilson and defendant when she heard shots, turned around, and saw defendant "grabbing" Wilson. She saw Wilson "sliding down the side of the house" and "it looked like [defendant] was shooting him." Bables begged defendant not to hurt her and he left.[5]

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[5] Johnson requested a sidebar during his cross-examination of Bables and asked for permission to inquire whether Wilson "told her that he was going to kill [defendant because] he had to [do so] or [a criminal street] gang was going to kill him." Johnson argued he should be permitted to elicit an answer to the question because if Wilson made a statement to that effect it would be a declaration against Wilson's penal interest. The trial court did not permit Johnson to ask the question.

3. The defense

Defendant testified in his own defense. As to the attempted murder charges against him, he told the jury he borrowed money from James and gave him a gun to hold as collateral. Believing defendant had repaid the loan in full, James was returning the gun to him when he realized defendant had repaid only part of the loan. James then "tried to grab [the gun] off" defendant and it accidentally fired; both James and Pamela were hit. Defendant did not say how many shots were fired. As for murder victim Wilson, defendant testified that although he and Wilson were "homeboy[s]," he left the gathering Bables described because Wilson "kept going into . . . different little rantings and ravings." As defendant was leaving, Wilson then approached defendant with a gun and defendant hit him. Around the same time, an unknown third party fired shots at defendant and he reacted by using Wilson "like a shield." Defendant claimed he then tried to revive Wilson, who had been shot, by "pumping his chest," but when defendant was unsuccessful he left the scene.

C. Verdict and Posttrial Motions

The jury found defendant guilty of the second degree murder of Wilson, the attempted murder of Pamela,[6] two counts of assault with a firearm (Pen. Code,[7] § 245, subd. (a)), and

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[6] Defendant had also been charged with the attempted murder of James but the jury was unable to reach a unanimous verdict on that charge and it was later dismissed.

[7] Undesignated statutory references that follow are to the Penal Code.

possession of a firearm by a felon (§ 29800, subd. (a)(1)). It also found true several alleged firearm enhancements. (§§ 12022.5, 12022.53, subds. (b)-(d), 12022.7, subd. (a).)

Evans replaced Johnson as attorney of record after the trial. Both Johnson and Evans filed motions for a new trial on defendant's behalf. Johnson's motion challenged (1) the trial court's denial of his request for a longer continuance to prepare for trial and (2) the court's refusal to allow him to cross-examine Bables regarding whether she overheard Wilson say he planned to kill defendant. Evans's motion challenged (1) the trial court's refusal to continue the trial so Evans could represent defendant at trial, and (2) Johnson's performance during trial—claiming he "was sleeping during the testimony of important witnesses" and changed defendant's theory of the case "from a theory of self-defense to a theory of provocative act murder."

The trial court denied both motions. Rejecting defendant's ineffective assistance of counsel argument, the court found Johnson received all discovery before trial, was given "a number of days to prepare," did not fall asleep, and did "an exemplary job of representing the defendant." The court further emphasized Johnson was "somewhat successful in that the jury did not convict the defendant on Count 2," i.e., attempted murder of James. Regarding the denial of the day-of-trial request to substitute Evans in as counsel, the court reiterated the request was made "at the last moment" and Evans was "not prepared to go at that time."[8]

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[8] Evans did not dispute the court's recollection that he was not prepared to start trial when he sought to substitute in to the case.

The trial court sentenced defendant to an indeterminate Three Strikes law sentence of 50 years to life in prison for the murder of Wilson (including a five-year term pursuant to *People v. Williams* (2004) 34 Cal.4th 397) and 25 years consecutive for the associated section 12022.53, subdivision (d) firearm enhancement true finding; life in prison for the attempted murder of Pamela and 25 years consecutive for the associated section 12022.53 finding; and life in prison for one of the assault with a firearm convictions. Sentences on other counts and for other enhancements were stayed.

II. DISCUSSION

Defendant seeks per se reversal of his convictions because, in his view, denying the last-minute motions to continue the trial—to allow Evans to take over the defense and, failing that, to give Johnson additional time to prepare and litigate the case—was an abuse of discretion infringing on his constitutional rights to counsel of his choice and effective assistance of counsel. A criminal defendant's right to counsel of his choice, however, is not absolute. Although considerations of administrative efficiency and judicial economy yield to a justifiable request for a continuance to accommodate a defendant's choice of counsel, defendant offers no legitimate justification for waiting until the morning of trial to inform the trial court he wanted to proceed with retained counsel. And regardless of whether Johnson would have litigated the case differently if he had not served in a standby capacity until the eve of trial, defendant has identified

no place in the appellate record that demonstrates his performance was constitutionally deficient.[9]

A. The Court Did Not Abuse Its Discretion When Denying a Continuance to Permit Evans to Take Over As Counsel

Criminal defendants have a constitutional right to the assistance of counsel for their defense. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §15.) "[A]n element of this right is the right of a defendant who does not require appointed counsel to choose who will represent him. [Citations.]" (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144.) Trial courts, however, retain "wide latitude in balancing the right to counsel of choice against the needs of fairness [citation] and against the demands of its calendar [citation]." (*Id.* at p. 152.) "A defendant's request for a continuance to enable him to obtain independent counsel of his choice is addressed to the trial court's sound discretion, and not every denial of such a request constitutes an abuse of discretion." (*People v. Vermouth* (1974) 42 Cal.App.3d 353, 360.)

"'There are no mechanical tests'" for determining whether denial of a continuance to accommodate a defendant's choice of

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[9] In advance of oral argument, we issued an order to show cause why Evans should not be sanctioned for submitting an opening brief with virtually no citations to the record in violation of California Rules of Court, rule 8.204(a)(1)(C). In response, Evans filed an opposition and a compliant opening brief. Having given the matter due consideration, and having received assurances that adherence to the Rules of Court will be given the priority it deserves in future cases, we exercise our discretion not to impose sanctions.

counsel is an abuse of discretion. (*People v. Crovedi* (1996) 65 Cal.2d 199, 207 (*Crovedi*).) Rather, "'[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.'" (*Ibid.*) "A continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' [Citation.] [¶] However, 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' [Citation.] For this reason, trial courts should accommodate such requests—when they are linked to an assertion of the right to retained counsel—'to the fullest extent consistent with effective judicial administration.' [Citation.]" (*People v. Courts* (1985) 37 Cal.3d 784, 790-791 (*Courts*).)

Thus, while trial courts have been found to have an obligation to permit a requested substitution of retained counsel that comes more than a week before trial and reflects diligence in securing private representation, this scenario "should be contrasted with . . . eve-of-trial, day-of-trial, and second-day-of-trial requests . . . ." (*Courts*, *supra*, 37 Cal.3d at pp. 792-793 & fn. 4.) In those eleventh-hour situations, the lateness of a continuance request is "a significant factor which justifie[s] a denial where there [are] no compelling circumstances to the contrary." (*Id.* at p. 792, fn. 4.) Examples of compelling circumstances to the contrary recognized in prior cases include last-minute charging decisions that substantially increase the defendant's exposure and "cause[ ] him to reconsider" his choice of counsel. (See, e.g., *People v. Byoune* (1966) 65 Cal.2d 345, 347.) When, on the other hand, a defendant offers no legitimate

justification for delay in seeking to engage private counsel, reviewing courts have affirmed rulings denying a continuance to permit substitution of private counsel without need for a showing of specific prejudice to the court, to witnesses, or to the People that would result from granting the continuance. (See, e.g., *People v. Blake* (1980) 105 Cal.App.3d 619, 624-625 ["[W]here, as here, the appellant has been provided a reasonable opportunity to obtain counsel of his own choice, no abuse of discretion occurs if the trial court fails to grant an additional continuance at or after the commencement of the trial"]; *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1367; *People v. Brady* (1969) 275 Cal.App.2d 984, 993-994.)

There are no compelling contrary circumstances here that establish the trial court abused its discretion when denying defendant's morning-of-trial request for a continuance to have Evans take over his representation. Defendant had plenty of time to seek to engage private counsel before the day scheduled for trial: nearly two years had elapsed since the preliminary hearing and it had been nearly three years since the offense conduct. Defendant was also well aware of the need to move quickly and timely retain counsel from the advisements on the *Farretta* waiver form he signed a year earlier (a request for a continuance "made just before trial will most likely be denied") and from the court's warning more than a month before trial that there would be no further continuances. The court also held a trial readiness conference just over a week before the April 3, 2018, trial date and there is nothing in the record that demonstrates defendant gave any indication at that time that he would be seeking to have private counsel take over his defense. There is likewise nothing in the record that suggests anything

about the criminal proceedings meaningfully changed in the month preceding trial—no last-minute charging decisions and no major tactical shifts in the People's anticipated presentation of evidence. Under these circumstances, the trial court could reasonably view defendant's request to substitute retained counsel and have trial proceed at an uncertain future date not as a responsible invocation of his right to counsel of his choosing but as a tactic to further delay a trial that he had repeatedly delayed and been told would be delayed no further. Put differently, the trial court's conclusion that defendant "waited to[o] long" to substitute retain counsel was not an abuse of discretion.[10]

B. The Trial Court's Denial of Johnson's Request for a Longer Continuance Was Not an Abuse of Discretion and Johnson Provided Effective Assistance of Counsel During Trial

Read charitably, defendant's opening brief suggests his right to a fair trial was denied because the denial of Johnson's request for a continuance left him with inadequate time to prepare. The argument is not well developed, but it is still apparent that it lacks merit.

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[10] Defendant additionally contends the trial court's decision to deny him a continuance to substitute Evans as attorney of record "was driven, at least in part, by the presence of stand-by counsel," and "[t]hus, . . . Rule 8.43 deprived [him] of his Sixth Amendment right to counsel of his choice." In effect, defendant contends Rule 8.43 deprives self-represented defendants of the right to force a continuance to accommodate a belated request to substitute counsel by providing an alternative (i.e., standby counsel) who may require less time to prepare. There is no such right.

Standby counsel "takes no active role in the defense, but attends the proceedings so as to be familiar with the case in the event that the defendant gives up or loses his or her right to self-representation." (*People v. Moore* (2011) 51 Cal.4th 1104, 1119, fn. 7.) Inherent in the concept of standby counsel is the expectation that the attorney's familiarity with the case will enable him or her to step into the shoes of the former self-represented defendant without delay. (*People v. Blair* (2005) 36 Cal.4th 686, 725 ["'Standby counsel' is an attorney appointed for the benefit of the court whose responsibility is to step in and represent the defendant if that should become necessary because, for example, the defendant's in propria persona status is revoked"], disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912.) Just as an attorney who substitutes into a case late in the proceedings will find himself or herself bound by previous tactical or procedural decisions made by prior counsel (*Smith v. Whittier* (1892) 95 Cal. 279, 289), Johnson had no valid legal basis to seek further delay in an attempt to walk back decisions defendant had made while representing himself. The trial court's decision to give Johnson several days to prepare, as opposed to 30 to 45 days, was not an abuse of discretion and certainly not a violation of constitutional guarantees. (*Crovedi*, *supra*, 65 Cal.2d at pp. 206-207 ["'The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process *even if a party fails to offer evidence or is compelled to defend without counsel*'"], italics added.)

Defendant further argues, however, that Johnson's actual performance during trial (sans his requested continuance) was constitutionally deficient in two specific respects. First,

defendant contends that before he relinquished his self-represented status, he "was preparing a case built on the theory of self-defense" but Johnson unreasonably "pursued a defense at trial based on provocative act murder, without consulting with [defendant]." Second, defendant contends Johnson provided ineffective assistance because he failed to object on discovery grounds when Pamela, in response to a question about what happened when she was shot, answered: "I believe my hand was like this [placing both of her hands on top of her head] because I was screaming 'Help me' . . . ."

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694[ ]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217[ ].)'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) We presume "'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.'" (*Ibid.*)

The defense at trial was not "provocative act murder" but rather a defense that an unknown third party happened to be shooting at defendant while defendant was scuffling with Wilson and defendant used Wilson as a human shield. There is no reason to believe on this record that Johnson's tactical decision of what defense to present (if it indeed was Johnson's rather than defendant's decision) was a decision that fell below prevailing professional norms. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 286 ["'A defendant does not have the right to present a defense of his

own choosing, but merely the right to an adequate and competent defense'"]; *People v. Weaver* (2001) 26 Cal.4th 876, 926 ["where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions"].)

To the contrary, even if a self-defense theory was viable at some point, it was severely weakened by the trial court's ruling—unchallenged on appeal—that the defense could not ask Bables about statements by Wilson suggesting he intended to kill defendant. Defendant himself testified he did not shoot Wilson and there is little, if any, other admissible evidence that would support a self-defense theory. Johnson, on the other hand, was able to advance the third-party shooter theory based on arguable tension between Bables's testimony that she saw defendant grabbing Wilson and the medical examiner's testimony that he found no physical evidence to confirm Wilson was shot at close range.

As to the asserted failure by Johnson to object when Pamela gestured about how she was shot (defendant claims he was denied discovery about a demonstration Pamela earlier made to detectives), Pamela's spontaneous demonstration while testifying does not, of course, establish a discovery violation, and "'[c]ounsel may not be deemed incompetent for failure to make meritless objections.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 732.) There is also no reasonable probability Pamela's demonstration of how her arms were positioned when she was shot had any impact on the outcome of this case. Whether Pamela's hands were on her head or not had little or no

bearing on her credibility when it was undisputed she was indeed shot in the hand.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

RUBIN, P. J.

KIM, J.